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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOISE CASCADE CORPORATION,
a Delaware corporation,
Petitioner,

v.

STATE OF OREGON,
Respondent.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Supremacy Clause of the U.S. Constitution required the Oregon Court of Appeals to apply controlling new case law from this Court, *i.e., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); and *Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003), to Petitioner's pending federal constitutional takings claims or whether the lower court was free to ignore those decisions based upon the "law of the case" doctrine.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Boise Cascade Corporation is a Delaware corporation that is a publicly traded company on the New York Stock Exchange. There is no parent or publicly held company owning 10 percent or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Boise Cascade Corporation ("Petitioner" or "Boise Cascade") respectfully petitions for a writ of certiorari to review a judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The decision of the Oregon Court of Appeals in *Boise Cascade Corp. v. Board of Forestry*, is reported in 63 P.3d 598 (Or. Ct. App. 2003) ("*Boise V*") and is reproduced as Appendix A ("App. A"). The Oregon Supreme Court's July 29, 2003 order denying Petitioner's petition for review (SC S50346) is reproduced as Appendix B ("App. B"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated September 3, 2001, granting the State of Oregon (the "State") summary judgment on its ripeness defense is reproduced as Appendix C ("App. C"). The Oregon Court of Appeals' 1999 opinion in this case is reported in 991 P.2d 563 (Or. Ct. App. 1999) ("*Boise IV*"), and is reproduced as Appendix D ("App. D"). The letter opinion of the Clatsop County Circuit Court (No. 93-2018), dated October 16, 1997, denying Petitioner summary judgment on its possessory takings claim based on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982), and granting summary judgment on the issue of liability on its regulatory takings claim based on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), is reproduced as Appendix E ("App. E"). The jury verdict finding the State liable on Petitioner's *Loretto* claim and making findings on the compensation issues is reproduced as Appendix F ("App. F"). The circuit court's judgment is reproduced as Appendix G ("App. G").

Before the trial, there was another set of appeals after the case originally had been dismissed by the Clatsop County Circuit Court. The Oregon Court of Appeals' opinion on the prior appeal, which reversed the trial court, is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1033 (Or. Ct. App. 1994), and is reproduced as Appendix H

("App. H"). [1] In that instance, at the State's request, the Oregon Supreme Court granted review and affirmed in part and reversed in part the court of appeals. The Oregon Supreme Court's opinion is reported in 935 P.2d 411 (Or. 1997) and is reproduced as Appendix I ("App. I").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for review of the decision of the Oregon Court of Appeals was issued on July 29, 2003. (App. B.) The appellate judgment was entered on September 17, 2003 and is reproduced as Appendix J ("App. J"). This petition is being timely filed within 90 days of entry of that judgment. 28 U.S.C.A. § 2101(c) (West 1994). The Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon courts is repugnant to the Supremacy Clause and the Fifth and Fourteenth Amendments to the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this case are (1) the Supremacy Clause, which provides: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," U.S. Const. art. VI; and (2) the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation," U.S. Const. amend. V. The Takings Clause is made applicable to the states through (3) the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of

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[1] A parallel appeal concerning the validity of the Board of Forestry's (the "BOF") decision denying Petitioner the right to harvest the subject timber is reported in *Boise Cascade Corp. v. Board of Forestry*, 886 P.2d 1041 (Or. Ct. App. 1994), *aff'd*, 935 P.2d 422 (Or. 1997).

life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Petitioner was prohibited from harvesting timber on its property based upon Oregon Administrative Rule 629-665-0210 (2000), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> (a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site . . . .
>
> (2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .
>
> . . . .
>
> (5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This rule is reproduced in its entirety as Appendix K ("App. K"). Also involved are Oregon Administrative Rules 629-680-0000 (2000), formerly 629-056-0010; 629-680-0010(5) (2000), formerly 629-056-0020(5); 629-680-0100(1) (2000), formerly 629-056-0100(1); and 629-680-0220 (2000), formerly 629-056-0220, which declare, define and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices L through O, respectively ("App. L," "App. M," "App. N," "App. O").

The U.S. Fish & Wildlife Service (the "USF&WS") is authorized to issue an Incidental Take Permit ("ITP") for the "taking" of a threatened species under section 9 of the Endangered Species Act (the "ESA"), 16 U.S.C.A. § 1539 (West 1985 & Supp. 2000).

STATEMENT OF THE CASE

A. Procedural History.

In June 1990, the USF&WS indicated it intended to list the northern spotted owl as a threatened species under the ESA. On July 23, 1990, that listing took effect. 55 Fed. Reg. 26,114 (June 26, 1990). At the same time, the USF&WS issued *Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl* (the "Procedures"), requiring the preservation of 70 acres of timber around all northern spotted owl nest sites. A copy of the Procedures is reproduced as Appendix P ("App. P").

Based on the Procedures, the BOF adopted former Oregon Administrative Rule 629-024-0809(1) and (2) (now renumbered at 629-665-0210(1) and (2) (2000) (*see* App. K)), requiring private landowners to protect a 70-acre area around a nest site or an activity center "occupied by an adult pair of spotted owls, capable of breeding." Or. Admin. R. 629-665-0210(2).

Before the time the owls were listed, Petitioner had in 1988 acquired a 65-acre parcel of timber as a part of a land trade with another forest products company. That parcel is known

as the Walker Creek Unit (the "Unit"). (App. H, 886 P.2d at 1035.) In 1989, Petitioner cleared a road into the Unit in anticipation of full-scale logging of the timber the following year. However, when the owls were listed in 1990, Petitioner stopped cutting trees in the Unit, because a pair of spotted owls had been found nesting there. (App. H, 886 P.2d at 1036.)

In February 1992, Petitioner filed in compliance with Oregon law a written plan with the Oregon State Forester (the "State Forester"), seeking permission to harvest the subject timber. (App. H, 886 P.2d at 1036.) That plan was denied by the State Forester based on Oregon Administrative Rule 629-665-0210. The State Forester indicated that Petitioner needed to protect approximately 56 acres of timber on its land as spotted owl nesting habitat (the other 14 acres comprising the protected habitat were on adjacent lands owned by the State and another private landowner). On May 5, 1992, Petitioner submitted an amended plan that was also denied, because Petitioner refused to acquiesce in designating 56 acres of its land as a public resource as an owl nesting site. (App. H, 886 P.2d at 1036.) It then appealed that denial to the BOF, which affirmed the State Forester's denial of the plan in a Final Order on January 15, 1993, a copy of which is reproduced as Appendix Q. Petitioner then sought review of the agency's order by the Oregon Court of Appeals, which affirmed the BOF's Final Order on December 7, 1994. (App. H, 886 P.2d at 1041.) That order was then also affirmed by the Oregon Supreme Court on April 10, 1997. (App. I, 935 P.2d 411.)

B. The Case.

After the BOF issued its Final Order in January 1993, Petitioner commenced an inverse condemnation action against the State in Clatsop County Circuit Court, alleging a "taking" of its timber under the Fifth Amendment to the U.S. Constitution and a similar provision in the Oregon Constitution. The State then filed a motion to dismiss on

various grounds, including that Petitioner had failed to allege facts sufficient to state a claim under the Fifth Amendment. The circuit court granted the State's motion on all grounds, and Petitioner appealed to the Oregon Court of Appeals.

The court of appeals reversed on all grounds, holding that valid takings claims were alleged under both the Fifth Amendment and the Oregon Constitution. (App. H, 886 P.2d 1033.) The State then sought review by the Oregon Supreme Court, which was granted. The Oregon Supreme Court affirmed that Petitioner had alleged a valid takings claim for the 56 acres of timber it had been prevented from logging. The court reversed as to a temporary takings claim, involving four acres located outside the protected nesting site, that Petitioner had been delayed in harvesting because of a temporal restriction. (App. I, 935 P.2d at 411, 420 n.14.) The court remanded the case to the circuit court for trial. (App. I.)[2]

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[2] While the first appeal was pending, on February 17, 1995, the USF&WS issued a Proposed Special Rule for the Conservation of the Northern Spotted Owl on Non-Federal Lands, 60 Fed. Reg. 9484 (Feb. 17, 1995), reproduced, in part, as Appendix R ("App. R"). That proposed rule indicates that at the time the northern spotted owl was listed in 1990 as a "threatened species" under the ESA, the USF&WS had at that time instituted a "blanket prohibition against incidental take of spotted owls." *Id.* at 9484; *see also id.* at 9490. (*See also* App. O.) The special rule that the USF&WS was proposing in February 1995 would have for the first time allowed for the issuance of IPTs to private landowners in the states of California and Washington, because those states had adopted rules that protected owl habitat beyond the 70-acre nesting site. However, because the Oregon Department of Forestry rule, which is the subject of this case, protected only the 70-acre nesting site, the USF&WS excluded the possibility of issuing IPTs to private timber owners in Oregon. *Id.* at 9489-90. Even in the states of California and Washington, the USF&WS indicated that the 70 acres closest to the nesting site would still remain protected. *Id.* at 9506 (Table 1). Therefore, the USF&WS certainly would not have issued Petitioner an ITP in 1993, when it sought the

After the case was remanded by the Oregon Supreme Court in 1997 for trial, Petitioner filed an amended complaint that separated its claim based on the Fifth Amendment into two counts. The first was a physical occupation theory based on *Loretto*, and the second was a regulatory takings theory based on *Lucas*. Petitioner then moved for summary judgment as to the issue of liability on both counts of its federal claim. (App. A, 991 P.2d at 563, 569.)

On October 15, 1997, the Oregon Department of Forestry informed Petitioner by letter that "[o]f the pair that previously occupied the Walker Creek site, the female was found dead last winter, and the male was recently observed at [another] site more than eight miles away." The letter is reproduced as Appendix S ("App. S"). *See also* 991 P.2d at 565. The letter went on to inform Petitioner that the State considered the nest site to be no longer protected under Oregon law, but suggested Petitioner consult with the USF&WS because that agency might consider the site to still be protected under the ESA. (App. S.) The following day, the circuit court issued a letter opinion granting Petitioner summary judgment on its *Lucas* count and denying it summary judgment on its *Loretto* count. (App. E.) (*See* App. D, 991 P.2d at 565.)

Petitioner then filed a Supplemental Complaint alleging a temporary taking for the almost five years that it had been denied the right to harvest the 56 acres of timber because of the Oregon regulation. At the conclusion of the trial, the circuit court submitted the issue of liability as to Petitioner's *Loretto* count to the jury. A unanimous jury found that "plaintiff Boise Cascade Corporation [was] required to submit to a physical occupation of its property as a result of the Board of Forestry's order." (App. F.) It also made findings as to the fair market value of the timber both at the

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State's approval to harvest the subject timber that was within the 70-acre nesting site and included the nest tree that had been occupied annually by owls since at least 1990.

time the Final Order was entered denying Petitioner the right to harvest the timber and the date the State declared the site to have been abandoned by the owls. (*Id.*) As a result of those findings, a judgment was entered in the amount of $1,820,059, including interest from the date of the taking (the court of appeals' opinion incorrectly states that the judgment was for $2,279,223). (App. A, 991 P.2d at 565.) A copy of that judgment is reproduced as Appendix T.

The State appealed. The Oregon Court of Appeals reversed the judgment, holding that Petitioner could not state a claim for the occupation of its land, for a physical taking based upon *Loretto*, because "[t]he State has no control over where spotted owls choose to nest." (App. A, 991 P.2d at 570.) It also reversed the summary judgment on the count based on *Lucas*. The court held that Petitioner's regulatory takings claim might not be "ripe" for adjudication because there was the possibility that if Petitioner had applied to the USF&WS for an ITP and one had been granted, the BOF could have exercised its discretion under Oregon Administrative Rule 629-665-0210(5) (2000) to approve Petitioner's logging plan. The Oregon Supreme Court then denied review, 18 P.3d 1099 (2000), and this Court denied certiorari, 532 U.S. 923 (2001).

After the case had again been remanded to the trial court, this Court decided *Palazzolo*, 533 U.S. 606, on June 28, 2001. Based upon this Court's holdings that a regulatory takings case is ripe when "the permissible uses of the property are known to a reasonable degree of certainty" and that the landowner was not required to submit "further and futile applications with other agencies," Petitioner moved for summary judgment on the State's "ripeness" defense. [3] *Id.* at

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[3] This Court also again stated that "[g]overnment . . . may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621 (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999)).

620, 626. Petitioner argued that the court of appeals had been wrong in holding that in order to satisfy ripeness Petitioner needed to show that it would have been futile to seek an ITP from the USF&WS before this action was commenced in 1993.[4] In rejecting Petitioner's argument the trial court stated:

> The Oregon Court of Appeals' 1999 opinion cited *Williamson* and other cases discussed in *Palazzolo*. Given the court of appeals' interpretation of *Williamson*, it is unlikely it would decide this case differently after *Palazzolo*.

(App. C.)

The trial court instead granted the State summary judgment on the issue of ripeness on the basis that Petitioner was estopped or precluded from demonstrating futility because it did not litigate that issue in the administrative proceeding before the BOF. (*Id.*; App. A, 63 P.3d at 602.)

On appeal, the court of appeals reversed the trial court's summary judgment in favor of the State on the grounds that it had not properly raised the defense of estoppel or issue preclusion that would bar Petitioner from showing it would have been futile to try to obtain an ITP from the USF&WS. It also held that the evidence that Petitioner had submitted in support of its cross-motion for summary judgment was

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[4] In support of its motion for summary judgment after the case was remanded in 1999, Petitioner put forward evidence that it would have been futile to try to obtain an ITP from the USF&WS. (App. A, 63 P.3d at 603-06.) However, at that time, Petitioner was not aware of the USF&WS' 1995 Proposed Special Rule that indicated the agency would not issue an ITP for spotted owls on private lands in Oregon, and even in Washington and California it would not issue any for habitat involving the 70 acres closest to the nesting site. 60 Fed. Reg. 9484. That document was discovered while the petition for review was pending before the Oregon Supreme Court and was promptly brought to the court's attention. (App. R.)

insufficient to show futility.[5] The court of appeals then remanded the case again to the trial court to allow the parties to present further evidence on the futility issue, holding,

> where there remains an unexplored *possibility* under the regulations in question that development can occur, a claim is not ripe and the "futility" exception will not apply unless the party claiming futility can show that there was very little likelihood—or no likelihood—that the development would have been approved had that party taken further steps to obtain approval.

(App. A, 63 P.3d at 605 (emphasis in original).)

The Oregon Supreme Court then denied Petitioner's Petition for Review of the court of appeals' decision. (App. B.)

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort refused to grant review. (App. C.) Under Rule 10(c), a ground for review exists when a state court has decided an important

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[5] As to the likelihood that the USF&WS would have issued Petitioner an ITP when the owls were actually nesting in the subject timber, the court below held that it was irrelevant that the federal government obtained an injunction against the Petitioner from harvesting the subject timber after the State had declared the nesting site to have been abandoned because the female owl had died and the male had found a new mate and was nesting several miles away. (App. A, 63 P.3d at 605); *see also Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 123 S. Ct. 1484 (2003). The USF&WS sought the injunction on the basis that other spotted owls might in the future nest there, even though no owls were presently nesting there that could be "harmed" under the ESA. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-706 (1995).

question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of these grounds for review are present in this case.

A. The Supremacy Clause of the U.S. Constitution Required the Oregon Court of Appeals to Consider and Apply All Decisions of This Court Pertaining to the Federal Issues in This Appeal.

In its 1999 opinion in *Boise IV*, 991 P.2d at 569-73, the Oregon Court of Appeals decided two federal constitutional issues—ripeness of Petitioner's regulatory takings claim and the elements of a physical taking—that were addressed in subsequent decisions of this Court in *Palazzolo* (ripeness); *Tahoe*, 535 U.S. 302 (defining distinction between regulatory and physical taking); and *Brown*, 123 S. Ct. 1406 (which also involved physical taking). Petitioner brought these decisions to the attention of the Oregon Court of Appeals and the Oregon Supreme Court and sought reconsideration of the 1999 *Boise IV* decision based upon those decisions. (*See* [Boise Cascade's] Motion to Reconsider Court's Prior Opinion in This Case Based upon a Recent U.S. Supreme Court Decision That Is Controlling, Which Overrules This Court's Earlier Dictum (CA A115966) (reproduced as Appendix U; *see also* [Boise Cascade's] Petition for Review (CA 226966) (reproduced as Appendix V)).)

The court of appeals rejected reconsidering its earlier decision as to those two issues based upon the "law of the case" doctrine, even though the Supremacy Clause makes the decisions of this Court binding upon all pending cases. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816).[6] (App. A, 63 P.3d at 601; Order Denying Motion to Reconsider Prior Opinion (CA

[6] These cases were also brought to the court of appeals' attention in Plaintiffs'/Appellant's Reply Brief and Petitioner's Petition for Review to the Oregon Supreme Court.

A115966) (reproduced as Appendix W ("App. W")).) The court of appeals in *Boise V* did refer to both *Palazzolo* and *Tahoe* for other propositions of law that are not relevant to the issues raised by this Petition. (App. A, 63 P.3d at 600 n.1, 604.)

1. The Court of Appeals Improperly Refused to Apply *Palazzolo* on the Issue of Ripeness and Futility.

In *Boise IV* the court of appeals held that Petitioner's federal constitutional regulatory takings claim based on *Lucas* was not ripe, because Petitioner had failed to seek an ITP from the USF&WS after the BOF had issued a Final Order denying Petitioner's written plan to harvest the subject timber. Imposing a judicially created barrier to the assertion of plaintiff's Fifth Amendment rights, the court of appeals ruled that an ITP application was required unless it would have been futile to seek one. (App. D, 991 P.2d at 571-72; *see also* App. A, 63 P.3d at 601 (holding same and relying without further discussion on *Boise IV*).) The court's holding was clearly erroneous, because even if the USF&WS had granted Petitioner an ITP, the BOF at all times retained *plenary discretion* as to whether it should reconsider its enforcement of *state regulations* when an ITP had been granted by the federal government. The subject regulation states:

> Exceptions to the [Oregon state regulatory] requirements for protecting northern spotted owl nesting sites *may* be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

Or. Admin. R. 629-665-0210(5) (formerly Or. Admin. R. 660-024-0809(5)) (emphasis added).[7]

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[7] The sole purpose of subsection 5 is to insulate the State from any takings claims, because the BOF knew the USF&WS would

There is no ambiguity in that regulation. The existence of an ITP is merely something that the BOF may consider as a collateral matter. The regulation does not even require the BOF to give consideration to an ITP when enforcing state regulations. The BOF's discretion on the issue is unfettered. This Court should grant certiorari because the court of appeals was informed of the *Palazzolo* decision and failed to apply it properly in *Boise V.* Specifically, the court of appeals (1) refused outright to even reconsider whether ripeness was a viable defense for the State in the first instance, and (2) then misapplied *Palazzolo* in reaching its conclusion that there was an issue of fact as to whether an application for an ITP would have been futile.

In *Palazzolo* the owner of a waterfront parcel containing wetlands sued the Rhode Island Coastal Resources Council ("RICRC"), an agency empowered by state law to promulgate and enforce regulations to protect and preserve property along the Rhode Island coastline. RICRC enforced its regulations, denying a number of development plans submitted by the plaintiff, who eventually brought an inverse condemnation action for a Fifth Amendment regulatory taking. The Rhode Island Supreme Court ruled in favor of the state, holding that

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not issue an ITP that would allow a landowner to harvest the 70 acres of timber that was closest to the nesting site. (Apps. P, R.) By requiring the landowner to seek an ITP, the BOF could argue that it had not fully exercised its discretion until the USF&WS had issued one, even though nothing in the ESA requires a landowner to apply for an ITP. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927 (9th Cir. 2000). An ITP is merely a safe harbor provision that, if granted, protects the landowner against any civil or criminal liability under the ESA. The State also took the position that if the USF&WS indicated that an ITP was not required, it would not be sufficient to satisfy the BOF. 991 P.2d at 573-74. Thus the intent of the regulation was to force the landowner to seek an ITP that the State knew the USF&WS would not issue, so that the BOF could always argue it had not exercised its full discretion under this section, and thus assert that a takings claim was not yet ripe.

the plaintiff's claim was not ripe, even though RICRC had repeatedly denied him a development permit, because he had not sought a permit from the Rhode Island Department of Environmental Management and the local municipality. 533 U.S. at 624. This Court reversed, holding that the Takings Clause of the Fifth Amendment does not allow state governments to impose "repetitive or unfair land-use procedures in order to avoid a final decision." *Id.* at 621. In rejecting the government's claim that the failure to seek approval from agencies other than RICRC made the claim unripe, this Court held that "federal ripeness rules do not require the submission of further and futile applications with other agencies." *Id.* at 626.[8]

The holding in *Palazzolo* was brought to the attention of the court of appeals during the briefing of *Boise V* with a request that the court reconsider its holding in *Boise IV* that ripeness was a viable defense, absent futility. The court of appeals rejected this out of hand in *Boise V*:

> Most of Boise's arguments in support of summary judgment were to the effect that this court's decision concerning ripeness and futility in *Boise IV* was wrong. The trial court rejected those arguments and, to the extent that Boise repeats them at great length on this appeal, we reject them without further discussion. *See generally State v. Pratt*, 316 Or. 561, 569, 853 P.2d 827 (1993) (under the law of the case doctrine, "when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the

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[8] The court of appeals in *Boise IV* had ignored a similar statement by the Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (App. D, 991 P.2d at 571-74; *see also* Respondent's Brief in *Boise IV* at 25-26).

> same litigation and upon the appellate court itself in any subsequent appeal").

(App. A, 63 P.3d at 601.)

Accentuating its refusal even to consider Petitioner's request that its claims should be reevaluated in light of new U.S. Supreme Court precedent, the court of appeals later stated:

> As noted above, we summarily reject Boise's attempts to relitigate the issue decided in the previous appeal concerning the availability of the ripeness defense, thus disposing of the majority of the arguments Boise asserts in this appeal.

(App. A, *id.* at 601-02.)

The court of appeals ruled only as to whether Petitioner's motion for summary judgment on futility should be granted. It erred in affirming the circuit court's denial of that motion, because it incorrectly evaluated the issue as one calling for a particular quantum of proof that Petitioner would have been granted an ITP by the USF&WS. (App. A, *id.* at 603-05.) That missed the central point of plaintiff's motion—that an ITP has no authoritative effect upon the BOF and the state laws and regulations it enforced against Petitioner to cause the taking. *New York v. United States*, 505 U.S. 144 (1992).[9] The taking occurred as a result of a state agency enforcing state laws and state regulations that could neither be reversed nor modified by any ITP Petitioner might have obtained, because the BOF at all times retained plenary discretion to simply disregard an ITP. (App. K, Or. Admin. R. 629-665-0210(5) (formerly Or. Admin. R. 660-024-0809(5)).)

The State can ban logging, and then prohibit the assertion of the federal constitutional right to just compensation by

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[9] *See* note 6, *supra*. The State took the position that its regulation must be given effect to protect the nesting site, even if the USF&WS indicated that an ITP was not necessary. (App. D, 991 P.2d at 573-74.)

sending the plaintiff first to the federal government for a permit that the BOF may then ignore. *Palazzolo* bars this sort of administrative legerdemain as a matter of federal constitutional law. 533 U.S. at 626 (citing *Felder v. Casey*, 487 U.S. 131, 150-51 (1988)). The Fifth Amendment rights of property owners cannot be impeded by states in requiring landowners to apply for permits that cannot provide the landowners with the ability to affect the state agency's decision to take the property.

2. The Court of Appeals Improperly Refused to Reconsider Its Prior Ruling on Boise Cascade's Claim for a Physical Occupation Taking.

After the case had been briefed in the court of appeals and before it was argued, this Court decided *Tahoe* in April 2002. A second holding of the court of appeals in *Boise IV* was that Boise Cascade could not base its claim on a physical taking theory.[10] (App. D, 991 P.2d at 569-70; *see also* App. A, 63 P.3d at 600.) The court had held that a physical taking theory was inappropriate because "[t]he state has no control over where spotted owls choose to nest." (App. D, 991 P.2d at 570.) The court went on to hold that in order to prevail, Boise Cascade must proceed on a regulatory theory, which also involved the issue of ripeness discussed above.

In *Tahoe* this Court laid down a bright-line test for distinguishing between a physical taking and a regulatory taking. 535 U.S. at 324 n.19. First, a physical taking gives the government a right to use the property for a public purpose, while a regulatory taking "does not give the government any right to use the property." *Id.* Second, a physical taking affects the right of the property owner to

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[10] A unanimous jury had found that Boise Cascade had been required to submit to a physical occupation of its property as a result of the BOF's order denying its written plan to log the subject property. (*See* App. D, 991 P.2d at 565; *see also* App. A, 63 P.3d at 600.)

exclude others from using its property, while a regulatory taking does not. *Id.* Contrary to the court's holding in *Boise IV*, control over the occupant is not a factor in a physical taking analysis.[11] In this case the State has asserted both the right to use Petitioner's property for a public purpose and denied it the right to exclude the owls by harvesting their nesting site or doing anything else that might cause them to leave the nesting site.[12]

Petitioner brought the *Tahoe* opinion to the attention of the court of appeals and moved the court to reconsider its holding as to the physical takings issue in light of that decision. (App. U.)

On July 1, 2002, before oral argument, the court issued an order stating:

> Appellant has moved for reconsideration of a portion of the court's decision disposing of a previous appeal in the same trial court case. The motion is denied on the ground that this court's prior decision is final and may not be altered by way of a motion filed in a subsequent appeal.

(App. X.)

The "law of the case" doctrine upon which the court of appeals relied in refusing to reconsider its *Boise IV* decision in light of this Court's subsequent decisions in *Palazzolo* and *Tahoe* is not an absolute rule, but one based upon policy reasons that do not apply when a subsequent ruling by a

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[11] The government had no control over the company that installed the cable television box in *Loretto*. The city of New York merely authorized the company to install it against the wishes of that property owner. 458 U.S. at 432 n.9. (App. K.) Nor did the government have any control over the occupants of boats that wished to use the plaintiff's private pond in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[12] The regulation that is the subject of this action, Oregon Administrative Rule 629-665-0210(1)(b) (2000), prevents the property owner from conducting any activities that might cause the "owls to flush" from the nesting site. (App. K.)

higher court shows that the court's earlier decision was in error. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739-40 (D.C. Cir.), *cert. denied*, 516 U.S. 865 (1995).

Moreover, under the Supremacy Clause of the U.S. Constitution, once this Court decides a federal constitutional question it becomes the law of the land and all state courts are required to follow that holding in all pending cases. *Cooper*, 358 U.S. at 18; *Martin*, 14 U.S. (1 Wheat) 304. Moreover, a state court's refusal to consider a federal issue under "law of the case" doctrine does not limit this Court's ability to review the question. *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997).

After the court of appeals refused to reconsider either of its prior holdings based upon *Palazzolo* and *Tahoe*, Petitioner petitioned the Oregon Supreme Court to review the decision pursuant to the Supremacy Clause of the U.S. Constitution. While that petition was pending, this Court decided *Brown*, 123 S. Ct. 1406, on March 26, 2003, which Petitioner promptly brought to that court's attention. (App. V.)

In *Brown* this Court again revisited the issue of whether a taking was a regulatory one or a per se physical taking. *Brown* involved the issue of whether using interest on lawyers' trust accounts ("IOLTA") to provide funds to support legal aid programs constituted a taking.

Below, the Ninth Circuit en banc majority had analyzed the case based upon the ad hoc regulatory taking reasoning stated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Brown*, 123 S. Ct. at 1416. The Ninth Circuit dissenters argued that there had been a per se physical taking based upon *Loretto*, 458 U.S. 419, and *United States v. Causby*, 328 U.S. 256 (1946). *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 865 (9th Cir. 2001). As the dissenters noted, this Court has never used a regulatory takings analysis when government has actually used the property in question for its own purposes. *Id.* at 865-66. This Court agreed with the Ninth Circuit's dissenters and

held that because the IOLTA trust funds were being used for a public purpose, there had been a per se physical taking. *Brown*, 123 S. Ct. at 1417-19. In support of its position that the IOLTA claim involved a physical taking and not a regulatory taking, this Court quoted at length from its opinion in *Tahoe*. *Id.*

In *Brown*, the government had no control over where the lawyers chose to deposit trust funds. Nor did it have any control over whether the lawyers would choose to deposit them in non-interest-bearing trust accounts, which would make them subject to IOLTA, or in interest-bearing trust accounts in which the interest would go to their clients rather than IOLTA. *Id.* at 1413.

In *Brown*, the state merely authorized that interest accrued on non-interest-bearing trust accounts be used for a public purpose. In *Loretto*, the government had merely authorized a television cable equipment company to install its equipment on private apartment buildings of the company's choosing. Authorization by government, and not control by it, has always been sufficient to constitute a physical taking. *Loretto*, 458 U.S. at 432 n.9.

a. Under a Physical Occupation Theory, the Test Is Whether the Landowner Has the Right to Exclude Wildlife, Not Whether the State Has Control over It.

The court below shifted the focus of this Court's physical takings jurisprudence from the issue of whether there had been a forced occupation authorized by government, to whether government had control over the occupant, which this Court has never deemed to be the determining factor. *Id.*; *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 522 (1992). In a physical takings case, the key issue is whether the landowner has the right to exclude the government-authorized occupant and has been forced to acquiesce to the occupation. *Yee*, 503 U.S. at 527; *Kaiser Aetna*, 444 U.S. at 176. Due to the ESA and state regulations that impose similar wildlife

servitudes, there are a growing number of cases in which government has imposed wildlife servitudes. In *Lucas* this Court stated:

> On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018.

A number of persons in academia are urging courts to ignore established principles of property law in order to protect wildlife. They argue that this Court has taken an anachronistic approach to takings cases involving natural habitat, based upon an archaic view of property rights that must change in order to save the environment. James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993) ("The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it."); *see also* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1988); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 Stan. L. Rev. 1433, 1445 (1993); Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. Rev. 77, 105-06 (1995); Hope M. Babcock, *Should* Lucas v. South Carolina Coastal Council *Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 Iowa L. Rev. 849, 886-87 (2000); Melinda Harm Benson, *The* Tulare *Case: Water*

Rights, the Endangered Species Act, and the Fifth Amendment, 32 Envtl. L. 551, 555-56 (2002); Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. Envtl. Aff. L. Rev. 357, 360-74 (1996); Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 Iowa L. Rev. 297, 317 (1995); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 Tul. Envtl. L. J. 331 (2003).

See also Eric T. Freyfogle, *The Land We Share: Private Property and the Common Good* at 234-38 (2003). Although Professor Freyfogle argues that the protection of wildlife should trump the right of private landowners to make economic use of their property, he does recognize that the ESA and similar state laws impose "burdens [that] can be severe—as when the act bans all construction or tells landowners they cannot harvest their trees—and the act does seem to strike like lightning, applying only to the tiny percentage of landowners whose land includes designated critical habitat." *Id.* at 237.[13] However, his solution is not to compensate those landowners who have been singled out to bear such burdens, but rather "to protect wildlife better and make the law fairer, the idea embedded in the [ESA] must be expanded to include more species and more habitat types." Freyfogle, *supra*, at 237.

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[13] As another scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reciprocity of advantage, the ESA [and state regulations such as the subject one based upon it] burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Preventing "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

The current trend of the lower courts is to implicitly adopt this view and refuse to find a taking and award compensation. In addition to *Boise IV*, see *Boise Cascade*, 296 F.3d at 1354, in which the Federal Circuit adopted the reasoning of the Oregon court. *See also Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (compare opinion of Justice White dissenting from denial of certiorari); *Fla. Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So. 2d 761 (Fla. Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994). In *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338 (Cal. Ct. App. 1993), the California Supreme Court affirmed the lower court, 876 P.2d 505 (Cal. 1994), but omitted any discussion of the takings issue and took the extraordinary step of directing that the lower court's opinion not be published in the official reports. No. S037820, 1994 Cal. LEXIS 1388 (Cal. Mar. 18, 1994).

Earlier cases recognized that if government required private landowners to set aside wildlife habitat for public use, they had to be compensated for it. *Bailey v. Holland*, 126 F.2d 317, 324 (4th Cir. 1942) ("If the Government wishes to do more in the way of protecting migratory birds than prohibiting their slaughter, ... it must acquire some proprietary interest in the areas suitable for such uses."); *State v. Herwig*, 117 N.W.2d 335, 340 (Wis. 1962) (holding that in order to protect bird nesting habitat on private land "the state should acquire whatever rights or easements are needed by purchase, lease or condemnation"); *Shellnut v. Ark. State Game & Fish Comm'n*, 258 S.W.2d 570, 574 (Ark. 1953) (taking of private property for wildlife refuge required compensation).

Even this Court's decisions in *Kaiser Aetna*, *Loretto* and *Yee*, which have clearly held the right to exclude is the keystone of a physical taking, have not had much effect on the lower courts when wildlife protection is the issue. In cases such as *Southview Associates, Ltd. v. Bongartz*, 980

F.2d 84 (2d. Cir. 1992), and *Moerman v. State*, 21 Cal. Rptr. 329 (Cal. Ct. App. 1993), the courts simply ignored that private property was being put to a public use of providing wildlife habitat and instead held that there had been no taking, because the landowners had at least a theoretical ability to exclude large wild mammals by fencing their lands. *Southview* involved deer and *Moerman* involved elk, and the courts in those cases held that because the landowners had the right to exclude such animals, there had been no physical taking under *Kaiser Aetna*, *Loretto* and *Yee*.

However, since even legal fictions must at least be plausible, a theoretical right to exclude wildlife could not provide a rationale in cases involving spotted owls, because they, like other birds, cannot be fenced out from private lands. Thus the court below had to ignore the hallmarks of a physical taking: not only that Petitioner's timber was being used for a public purpose of providing spotted owl habitat, but also that Petitioner was prevented from taking any action to exclude the birds from its property. *See Tahoe*, 535 U.S. at 324 n.19. Instead, the court below invented a new rationale to support its decision, *i.e.*, the government did not have control over the birds, although it was asserting complete control over how the subject timber was to be used for the owls' benefit.

Here, the subject regulation goes beyond merely regulating the use of Petitioner's land by requiring that Petitioner use it for only one purpose, which is a public purpose. *Yee*, 503 U.S. at 522-23. It prohibits Petitioner from conducting any activity on its property that "cause[s the] owls to flush from the nesting site." Or. Admin. R. 629-665-0210(1)(b). Petitioner had no choice under the subject regulation but to acquiesce to the occupation of its timber as a nesting site. 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." (emphasis in original)). Petitioner was prevented by the subject regulation from harvesting its

timber or doing anything that could cause the birds to "flush from the nesting site." The State consequently exerted as much control over Petitioner's property as if it had acquired a formal easement for bird nesting habitat. Or. Admin. R. 629-665-0210(1)(b); *cf. North Dakota v. United States*, 460 U.S. 300 (1983). Petitioner was prevented from excluding the owls from its property, so that the property could be used for a public purpose.

b. A State May Not Require a Landowner to Obtain a Permit from a Federal Agency in Order to Satisfy "Ripeness," When the State Has No Obligation to Issue Its Own Permit, Even if the Federal Permit Is Granted.

The second important issue involves satisfying the ripeness requirement before adjudicating a regulatory takings claim. If the decision below is left to stand, a state administrative agency can avoid making a final decision satisfying ripeness by unfairly requiring a landowner to pursue a collateral approval from a federal agency that has no authority to either approve or disapprove the landowner's logging plan, and that is on record that it will not issue an ITP that would involve harvesting the timber on the 70 acres closest to the nesting site. (Apps. P, R.) In this case, even if Petitioner had obtained an ITP from the USF&WS, the state agency was under no obligation under Oregon law to exercise its discretion so as to approve Petitioner's logging plan.

In arguing that Petitioner's claim was not ripe until Petitioner had sought an ITP from the USF&WS, the State was not claiming that it might approve some different plan than the one previously submitted. Any new plan would involve a request to harvest the same 56 acres of timber that was the subject of the request that had been denied in the BOF's Final Order.

"Ripeness" is satisfied when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an

actual, concrete injury." *Williamson County*, 473 U.S. at 193. The BOF's Final Order certainly did that. Under the BOF's own regulation, it had no discretion but to deny Petitioner the right to harvest 56 acres of merchantable timber, unless Petitioner obtained an ITP for the owls from the USF&WS. Moreover, the BOF did not base its decision on the possibility that it might, in the future, approve Petitioner's logging plan, if Petitioner obtained an ITP. In fact, the BOF's Final Order (App. S) cites a letter from its counsel to the USF&WS, reproduced as Appendix Y, indicating that Oregon law would not be satisfied if the USF&WS were to issue a decision finding that an ITP was not required. Likewise, potential future exercise of discretion by the BOF allowing Petitioner to log its timber based upon an ITP from the USF&WS would not bar a temporary takings claim based on the BOF's Final Order. Until that Final Order was reversed, a taking was occurring. *Lucas*, 505 U.S. at 1012-13; *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987). The granting of an ITP, and a waiver based upon it, would have merely turned a permanent taking into a temporary one.

Under *Williamson County*, a landowner is not required to seek review from another agency that does not have the authority to participate in the decision-making process. 473 U.S. at 193. The USF&WS had no authority to authorize logging; its concern under the ESA is to prevent the owls from being harmed in a manner that actually kills or injures them. *Sweet Home*, 515 U.S. at 700 n.13. By requiring Petitioner to apply for an ITP under the ESA, the State was imposing a requirement as a condition for its approval that does not exist under federal law. *Defenders of Wildlife*, 204 F.3d at 927.

Nor, as this Court subsequently stated in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 350 n.7 (1986), can government require "unfair procedures in order to" satisfy ripeness. Trying to obtain an ITP from the

USF&WS under the exception provision in Oregon Administrative Rule 629-665-0210(5) would have been an unfair, repetitive exercise in futility. *City of Monterey*, 526 U.S. at 698-99.

It would have been unfair because the ITP process would likely have added years to the administrative process, when the State knew that the USF&WS would not issue an ITP based upon its own spotted owl Procedures. (Apps. P, R.) required conservation measures far broader than those needed for the owls nesting in Petitioner's timber. *See also* Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 Stan. L. Rev. 305, 326, 335 (1997) ("Property owners repeatedly voice dismay over their almost Kafkaesque inability to reach closure under the ESA."); Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 Envtl. L. 803, 805 (1997) (USF&WS requires, as part of a Habitat Conservation Plan that is part of ITP process, that landowners protect habitat not only for subject species of ITP, but also for "all species which might ever reside on the property"). Likewise, even if an ITP were issued, the BOF was not required to approve Petitioner's logging plan. Or. Admin. R. 629-665-0210(5); (App. J).

It would have been repetitive, because if the USF&WS had issued an ITP for the owls nesting in the Unit, the new plan would have been to harvest the same 56 acres of timber that the BOF had disapproved in its Final Order. Since the BOF created the subject regulation, it could have exercised its discretion and approved harvesting the timber when the plan was initially before it, by simply waiving or rescinding the rule. The State did not need the USF&WS' approval of an ITP to grant that permission.

It would have been an exercise in futility, because the record on appeal clearly indicates that if Petitioner had sought an ITP from the USF&WS in 1993, before the BOF's Final

Order, the USF&WS would not have issued an ITP. (Apps. P, R.)

The record shows that shortly before the State deemed the Boise Cascade nest site to have been abandoned, the USF&WS obtained an injunction against another timber owner because there was a spotted owl activity center approximately one mile away from the harvest site (a mile's distance is well beyond the 70-acre core area protected under Oregon law). *United States v. W. Coast Forest Res. Ltd. P'ship*, No. CIV. 96-1575-HO, 2000 WL 298707, at *1 (D. Or. Mar. 13, 2000). A copy of that order is reproduced as Appendix Z ("App. Z"). That injunction was not lifted until almost three years later when, after monitoring the owls' movements by radiotelemetry, the USF&WS failed to prove that logging the subject timber would have any significant impact upon them. (App. Z, 2000 WL 298707, at *5.) Also while this action was pending before the Oregon courts, the State brought a legal action against the USF&WS, alleging that it had threatened to take legal action against the State and its employees, pursuant to the ESA, if they failed to enforce the Procedures that the USF&WS had been forced to rescind. *State of Oregon v. Int'l Paper Co.*, U.S.D.C. Or. Civil No. 93-6223-HO (complaint dated July 1993 at 4). A copy of that complaint is reproduced as Appendix AA.

Shortly after the State, in October 1997, declared the nest site on Petitioner's land to have been abandoned, Boise Cascade submitted, and the State Forester approved, a new logging plan to harvest the 56 acres that had previously been protected. Petitioner, through its counsel, inquired of the USF&WS whether it still considered the site to be protected under the ESA due to the death of the female owl and the abandonment of the nesting site by the male owl. Counsel for the federal government responded by indicating that the USF&WS did still consider the nesting site to be occupied and suggested Boise Cascade apply for an ITP if it desired to harvest its timber. A copy of the federal government's

December 10, 1997 letter is reproduced as Appendix BB. Petitioner then commenced an action in the United States District Court for the District of Oregon against the USF&WS, seeking a declaratory judgment that the site was no longer occupied and was, therefore, no longer protected under the ESA. *Sweet Home*, 515 U.S. 687. The federal government filed a counterclaim seeking an injunction barring Petitioner from logging its timber because the USF&WS did not consider the nest site to have been abandoned. The district court granted the government an injunction prohibiting Petitioner from cutting any trees on its property unless it first obtained an ITP for the owls. A copy of the district court's decree and judgment is reproduced as Appendix CC.

As a result of the injunction, Petitioner submitted an application for an ITP to the USF&WS, along with a Habitat Conservation Plan for the Unit. In August 1999 the USF&WS also came to the conclusion that the site had been abandoned and notified Petitioner that it would not oppose dissolving the injunction. A copy of that letter is reproduced as Appendix DD. This was two years after the State had declared the site to have been abandoned. Over nine years elapsed between the time the State adopted its regulations that prevented Petitioner from logging its timber and the date the federal injunction was lifted. The law does not require the doing of a useless act in order to satisfy ripeness.

The BOF's Final Order clearly defined the impact of the regulation on Petitioner's property: Petitioner was prevented from making any economic use of 56 acres of merchantable timber. Once the BOF issued its Final Order, there was no question about how the subject regulations applied to the particular land in question. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997). At that point there was no permissible economic use of the timber subject to the restriction. The BOF had no discretion under its own rule but to deny Petitioner's logging plan, unless Petitioner was

successful in the future in obtaining an ITP for the owls from the USF&WS. Moreover, as this Court stated in *Suitum*, Petitioner's "takings claim [cannot] be kept at bay from year to year" on the remote possibility that the USF&WS would grant an ITP, which in turn would allow the BOF to exercise its discretion and approve Petitioner's logging plan. *Id.* at 741. Such a rule, as adopted by the subject regulation and approved by the courts below, would allow the State "to stultify the Fifth Amendment's guarantee." *Id.*

This Court's prudential ripeness doctrine is based on the fact that land use boards usually have a "high degree of discretion" in applying a law to a parcel of property. *Id.* at 738. However, the BOF was not applying a land use regulation, and it had no discretion under Oregon Administrative Rule 629-665-0210 but to deny Petitioner the right to log the area surrounding the spotted owl nest site. Only it could waive or modify that rule; the USF&WS could not.

Even if Petitioner had applied for an ITP after the BOF had issued its Final Order in 1992, that would not have barred Petitioner's claim for compensation for a temporary takings claim for the period it was prevented from logging its property. *First English*, 482 U.S. 304; *Lucas*, 505 U.S. 1003. If the USF&WS had denied an ITP, the BOF had no authority to reverse its Final Order and allow Petitioner to log its property, unless it waived or modified its rule, which it always had the discretion to do and could have done before it issued its Final Order. Or. Admin. R. 629-665-0210(5). And if the ITP was granted, the BOF was also under no obligation to reverse its Final Order and allow Petitioner to log its property. *Id.*

B. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal and State Courts.

The Oregon Court of Appeals' reversal of the "takings" judgment entered here after trial is contrary to the basic

physical taking jurisprudence of this Court as stated in *Tahoe*, *Brown*, *Loretto*, *Yee* and *Kaiser Aetna*. There is, however, a split among the lower courts in cases involving wildlife over whether a property owner can sustain a claim based on a physical takings theory. The earlier and better reasoned cases focus on whether the property owner has the right under the subject law to exclude the animals from its land. If not, the forced occupation imposes a wildlife servitude. *Bailey*, 126 F.2d 317; *Herwig*, 117 N.W.2d 335; *Shellnut*, 258 S.W.2d 570. In conflict with this line of cases are those such as the decision below that avoid the public use and exclusion analysis, and hold that there was no forced occupation that constituted a taking, because the State has no control over wildlife. *Boise Cascade*, 296 F.3d 1339; *see also Christy*, 857 F.2d 1324; *Fla. Game & Fresh Water Fish Comm'n*, 636 So. 2d 761; *Sierra Club*, 26 Cal. Rptr. 2d 338.

As pointed out above, the Oregon appellate courts have raised hurdles to satisfying prudential ripeness requirements that go far beyond this Court's takings jurisprudence. They also have a long history of misreading or ignoring this Court's takings jurisprudence. *Dolan v. City of Tigard*, 832 P.2d 853 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. Ct. App. 1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting); *Dodd v. Hood River County*, 836 P.2d 1373 (Or. Ct. App. 1992), *aff'd*, 855 P.2d 608 (Or. 1993) (dismissing much of what this Court stated in *Lucas* as dicta); *GTE Northwest v. Pub. Util. Comm'n of Or.*, 883 P.2d 255 (Or. Ct. App. 1994), *rev'd*, 900 P.2d 495 (Or. 1995).

CONCLUSION

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Oregon Court of Appeals.

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